No. 76-1740

In the Supreme Court of the United States

OCTOBER TERM, 1977

MIDWEST HANGER CO., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-15a) is reported at 550 F. 2d 1101. The decision and order of the National Labor Relations Board are reported at 221 NLRB 911 (Pet. App. 16a-82a).

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1977 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on June 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer improperly conditioned the reinstatement of employees upon the withdrawal of unfair labor practice charges that had been filed against the employer.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provide:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act. * * *
>
> * * * * *
>
> Section 10(e). * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

STATEMENT

In an unfair labor practice proceeding, the Board found, *inter alia*, that Midwest Hanger Co. and Liberty Engineering Corp. ("the Company") violated Section 8(a)(3) and (1) of the Act by terminating the employment of 18 employees, and refusing to reinstate another employee, because of their union activity. *Midwest Hanger Co.*, 193 NLRB 616. The company was required to offer these employees reinstatement to their former jobs, or, if such jobs no longer existed, to substantially equivalent positions, and to make them whole for any loss of earnings suffered as a result of the discrimination against them. 193 NLRB at 628-629. On February 20, 1973, the court below entered its judgment enforcing the Board's order as to 17 of the discriminatees. *National Labor Relations Board* v. *Midwest Hanger Co. and Liberty Engineering Corp.*, 474 F. 2d 1155, certiorari denied, 414 U.S. 823.

The parties were unable to agree on the amount of backpay due the discriminatees, and a supplemental backpay proceeding was instituted (see 29 C.F.R. 102.52, *et seq.*) for the purpose of determinating that amount. On June 7, 1974, the Regional Director issued a backpay specification setting forth, for each calendar quarter during the backpay period, each discriminatee's loss of pay due to the discrimination against him; interim earnings, if any; and net backpay due. The Company filed an answer and an amended answer. Thereafter, a hearing was held before an Administrative Law Judge to resolve the issues raised by the Company's answer and to establish the amount of backpay due (Pet. App. 8a). The Company contended, *inter alia*, that it had made a proper offer of reinstatement to certain discriminatees on October 25, 1970, thereby ending the backpay period on that date

(*ibid.*).[1] On May 20, 1975, the Administrative Law Judge issued his decision, finding that the 17 discriminatees were entitled to backpay totaling $112,530, with interest at the rate of six percent per annum, but minus tax withholding required by state and federal laws (Pet. App. 18a-82a). He found that the offer of reinstatement made on October 25, 1970, was not a valid offer and therefore did not toll the Company's backpay liability, since it was conditioned, *inter alia,* on the withdrawal of unfair labor practice charges that the Union (United Steelworkers of America, AFL-CIO) had filed against the Company. Accordingly, the backpay period continued until November 1973, when the Company made unconditional offers of reinstatement to the discriminatees (Pet. App. 19a-31a).[2]

The Company filed exceptions to the Administrative Law Judge's Decision. On December 1, 1975, the Board issued its Supplemental Decision and Order, affirming the rulings, findings, and conclusions of the Administrative Law Judge and ordering the Company to pay the discriminatees the amounts set forth in the Administrative Law Judge's Decision (Pet. App. 16a-17a).

The court below sustained the Board's finding that the offer of reinstatement on October 25, 1970, was conditioned on the withdrawal of the unfair labor practice charges, and was therefore insufficient to end the backpay

[1]The backpay period began when the discriminatees were discharged on various dates during June and July 1970.

[2]For one discriminatee, who was improperly reinstated in November 1973, the backpay period continued until he resigned in April 1974 (Pet. App. 51a-52a).

period (Pet. App. 8a-12a).[3] The court enforced the Board's supplemental order with minor modification not relevant here (Pet. App. 7a-15a).[4].

ARGUMENT

1. The question which the Company seeks to raise (Pet. 2)—whether an offer of reinstatement, conditioned on withdrawal of pending unfair labor practice charges, is a valid offer which tolls backpay liability—is not properly presented. Both before the Board and in the court below, the Company contended only that it had not, in fact, conditioned reinstatement on the withdrawal of unfair labor practice charges; it never contended that such a condition did not, as a matter of law, render the reinstatement offer invalid. Since the legal issue was not raised before the Board, Section 10(e) of the Act precludes judicial review of that issue. *National Labor Relations Board* v. *Seven-up Bottling Co. of Miami, Inc.,* 344 U.S. 344, 350; *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U.S. 253, 255-256. The failure to raise the issue in the court below likewise precludes its consideration here. *Lawn* v. *United States,* 355 U.S. 339, 362 n. 16. Accordingly, the only issue presented is whether substantial evidence supports the Board's finding, which was sustained by the court below (Pet. App. 10a-12a),

[3]The Board had found that other improper conditions were also imposed on the offer of reinstatement (Pet. App. 29a-31a). The court below found it unnecessary to pass on these findings (Pet. App. 12a n. 7).

[4]The Board's order was fully enforced as to 16 of the 17 discriminatees. As to the remaining discriminatee, the case was remanded for further proceedings in light of the court's conclusion that she should not have been awarded backpay for one period of 2-1/2 months in late 1972 and early 1973 (Pet. App. 14a-15a). On remand, the Board reduced its backpay award to her by $1491 (Pet. App. 3a).

that the Company conditioned reinstatement upon the withdrawal of unfair labor practice charges. Such an evidentary issue does not warrant review by this Court.

2. In any event, there is no merit to petitioner's contention that an offer or reinstatement conditioned on withdrawal of unfair labor practice charges is a valid offer. Petitioner concedes (Pet. 11) that "reinstatement offers which require * * * unlawfully discharged employees to forego basic rights under [the National Labor Relations Act] * * * are invalid and, if rejected, do not toll the Company's backpay liability to the discriminatees." A demand that the employees, or their representative, withdraw unfair labor practice charges as a condition of employment plainly requires them to forego a basic right—indeed, a right which is essential to the protection of all other statutory rights. As this Court has noted, "keeping people 'completely free from coercion' * * * against making complaints to the Board is * * * important in the functioning of the Act as an organic whole," for "[a] proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418, 424. In furtherance of this policy, it has been held that an offer of reinstatement, conditioned on withdrawal of unfair labor practice charges, is itself an unfair labor practice, violating Section 8(a)(4) of the Act. *National Labor Relations Board* v. *St. Marys Sewer Pipe Co.*, 146 F. 2d 995, 996 (C.A. 3). *A fortiori*, an offer so conditioned cannot toll backpay.

Nor do the considerations advanced by petitioner (Pet. 12-14) justify a different conclusion. A wrongfully discharged employee has a right to reinstatement and backpay. To require him to withdraw his unfair labor practice charges and thereby forego his right to backpay in return

for immediate reinstatement, as petitioner suggests an employer should be permitted to do (Pet. 14), would erode the principle that employees should not be penalized for exercising their right to file charges of unfair labor practices. Congress has clearly stated this policy in Section 8(a)(4) of the Act, making it an unfair labor practice to discriminate against an employee because he has filed charges under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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